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Nos. 96-552, 96-553

In the Supreme Court of the United States
October Term, 1996

Rachel Agostini, *et al.*,
Petitioners,

and

Chancellor of the Board of Education, *et al.*,
Petitioners,

v.

Betty-Louise Felton, *et al.*,
Respondents.

On Writ of *Certiorari*
To The United States Court of Appeals
For The Second Circuit

Brief *Amicus Curiae* of Americans United for Separation of Church and State, the American Civil Liberties Union, and the New York Civil Liberties Union, in Support of Respondents

Steven R. Shapiro
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Arthur N. Eisenberg
New York Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 382-0557

Steven K. Green*
Julie A. Segal
Americans United for Separation of Church and State
1816 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 466-3234

* Counsel of Record

41 pp

DISCLOSURE STATEMENT

This Brief *Amicus Curiae* is authored entirely by the undersigned counsel on behalf of *amici*. No person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory and Regulatory Provisions

Other Authorities

INTEREST OF AMICI[1]

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

Americans United for Separation of Church and State (Americans United) is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court, including bringing the case of *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985). Americans United has also brought on behalf of its members several challenges to the implementation of Title I with respect to parochial schools. *See Walker v. San Francisco Unified School Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991). The resolution of this case is therefore of special concern to Americans United and its members.

AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION

The American Civil Liberties Union (ACLU) is a nationwide nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. The ACLU has appeared before this Court in numerous church-state

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.

cases. For example, the ACLU represented the plaintiffs in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (upholding claim under the Free Exercise Clause), and *Lee v. Weisman*, 505 U.S. 577 (1992) (upholding claim under the Establishment Clause). The ACLU also filed an *amicus curiae* brief in *Aguilar v. Felton*, 473 U.S. 402 (1985). The resolution of this case, which seeks to overturn *Aguilar*, therefore involves a matter of direct concern to the ACLU and its members.

STATEMENT OF THE CASE

This case presents the Court with two important questions that may, depending on their resolution, dramatically affect both the substance of Establishment Clause jurisprudence and the manner in which many controversies are brought before the Court. This present case had its origins twelve years ago in the Court's decision of *Aguilar v. Felton*, 473 U.S. 402 (1985). There, this Court ruled that the Establishment Clause (in particular, concerns over excessive government entanglement with religion) barred the provision of Title I remedial and other educational services on the premises of parochial schools. Following that holding, the U.S. District Court for the Eastern District of New York entered a permanent injunction prohibiting the Secretary of Education and the Chancellor and Board of Education of New York City from using public funds to provide educational services on parochial school premises.

Since 1985, Title I services in New York City and throughout the nation have been provided to parochial school students through a variety of mechanisms. In some instances, those services have been provided in nearby public schools; in other instances, the local education agencies have leased neutral

sites or mobile instructional units/vans or have offered the services through computer assisted instruction. When mobile instructional units/vans have been used, they are usually parked adjacent to the parochial schools (at times, on parochial school property) for easy access. There is no recorded instance of parochial school students being denied Title I services if so desiring. *See Walker v. San Francisco Unified School Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Board of Educ. v. Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991).

Despite the effective operation of Title I services in this manner for over eleven years, in 1996 the Chancellor and Board of Education moved pursuant to to be relieved from the judgment and continuing injunction, citing financial costs and inconvenience in administering the program to parochial school students. The sole basis for relief under their Rule 60(b) motion was that a change in the law had occurred since this Court's decision in *Aguilar*. The District Court, while agreeing on the appropriateness of the Rule 60(b) procedure, denied the motion due to the absence of a change in the law. The Court of Appeals for the Second Circuit affirmed for substantially the same reasons stated in the District Court's opinion.

SUMMARY OF ARGUMENT

This Court should not sanction this use of Rule 60(b). Petitioners are not seeking to be relieved from a judgment as a result of a change in the law but are instead attempting to use Rule 60(b) to bring about a change in the law by obtaining reconsideration of *Aguilar v. Felton*. Such use of Rule 60(b) will threaten the finality of judgments, destabilize constitutional jurisprudence, and burden court dockets through excessive

filings as parties seek to be relieved from long-standing judgments.

In support of their urging that *Aguilar* be reversed, the Chancellor and supporting *amici* proffer a view of government "neutrality" toward religion that is inconsistent with Establishment Clause jurisprudence. While this Court has long embraced principles of neutrality for Religion Clause adjudication, it has always rejected the view that neutrality requires the funding of religious institutions and activities. Contrary to claims of petitioners, this Court's more recent Establishment Clause decisions are consistent with this traditional view of neutrality.

The principles enunciated in *Lemon v. Kurtzman* are also consistent with this traditional view of neutrality and remain central to Establishment Clause adjudication. In particular, the ban on excessive entanglements is key to preserving religious autonomy and ensuring the equal treatment of all religions. As such, it is a vital element of Establishment Clause jurisprudence.

This Court's decision in *Aguilar* was correctly decided, based on well-founded concerns of ongoing monitoring and review of not just public employees, but also parochial school activities. In addition, the placement of public employees in parochial schools via Title I raises other Establishment Clause risks, primarily through the massive infusion of public monies into parochial schools and the appearance of a joint operation between public and religious school officials.

ARGUMENT

I. Rule 60(b) is an Inappropriate Vehicle for Reconsidering this Court's Holding in *Aguilar v. Felton*.

This Court should not sanction this use of Rule 60(b). Petitioners are not seeking to be relieved from a judgment as a result of changed circumstances or a change in the law, but are instead attempting to use Rule 60(b) to bring about that very change by obtaining reconsideration of *Aguilar v. Felton*, 473 U.S. 402 (1985). This use of Rule 60(b) to reconsider the *Aguilar* decision is both unprecedented and problematic.[2]

Petitioners' sole basis for contending that they are entitled to reconsideration of the decision they lost twelve years ago is that the legal rationale behind *Aguilar* is no longer valid. In this regard, petitioners rely on: (1) statements contained in the concurring and dissenting opinions in *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2498, 2505, 2515 (1994); and (2) claims of a general shift in Court jurisprudence, including the assertion that this Court has abandoned the "no funding" prohibition in favor of the "neutrality" principle. Each of these rationales fails under scrutiny.

Petitioners rely principally on a combination of statements about *Aguilar* made in dicta by five of the justices in *Kiryas Joel*, not on an actual holding by this Court. Dicta statements in concurring and dissenting opinions do not

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[2] A fuller discussion of the Rule 60(b) issue is contained in the *Amicus* Brief of the New York County Lawyers Association, Committee on Supreme Court of the United States, which undersigned *amici* incorporate by reference.

constitute a change in the law sufficient to warrant relief under Rule 60(b). Rather, the Court has long held that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *see also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("this Court does not decide important questions of law by cursory dicta inserted in unrelated cases."). Petitioners' attempts to confer precedential value on dicta should be rejected by this Court.

Petitioners also rely on the contention that the law concerning public funding of religious institutions and excessive entanglement with religion has eroded in the last decade. As will be discussed *infra*, this Court has not retreated from its prohibition on government advancement of or involvement in religious matters, especially where it concerns parochial school education. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993).

As a result, it is clear that petitioners seek to affect a change in the law, not to benefit from a change that has already taken place. Rule 60(b) is an inappropriate vehicle for such proactive purposes. Furthermore, allowing petitioners to obtain reconsideration of their case under Rule 60(b) would destabilize the future of constitutional jurisprudence, undermine the finality of judgments, and disrupt *stare decisis*. The floodgates would be opened for litigants to seek review of prior judgments on the basis of "justice counting." Any criticism by a sitting justice of an earlier holding would invite parties to mount a Rule 60(b) petition claiming the law had "changed." Allowing Rule 60(b) to be used in this manner undermines the integrity of this Court's decisions and our judicial system. It should not be condoned.

II. The Court's Prohibition on Government Funding of Religion is Consistent with Principles of Neutrality Toward Religion.

A. This Court has Consistently Rejected a View of Neutrality that Requires Funding of Religion.

As part of their attack on the holding in *Aguilar*, the Chancellor and his supporting *amici* insist that an "irreconcilable conflict" exists in Establishment Clause jurisprudence, a conflict that can be resolved only by this Court's adoption of "neutrality" as the guiding principle for Religion Clause adjudication. Chancellor Brief at 25-30; Brief of Christian Legal Society, *et al.* at 6-14; Brief of Pacific Legal Foundation at 17-19. Under their proposed version of neutrality, the direct funding of inherently religious activity would be permissible provided it occurs through a general government program made available to all. As applied to the issue of Title I and other education programs, this neutrality principle would allow parochial schools to participate in such programs in the same manner and to the same extent as public schools, even if the educational funding or services were found to advance the parochial schools' religious missions or to involve the state directly in the religious educational function.[3]

This notion of neutrality is inconsistent with the principles underlying the Establishment Clause, and its

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[3] As a threshold matter, it is unnecessary for the Court to address this issue even if it is inclined to reverse *Aguilar*. Neither the Agostini petitioners nor the Secretary of Education advocates the adoption of a strict neutrality approach to Establishment Clause adjudication. As the Agostini petitioners acknowledge, "[n]eutrality or evenhandedness may not be sufficient to save a program of government aid that directly funds or subsidizes religious activity." Agostini Brief at 13.

adoption would cause a wholesale revision of the Court's past and current church-state jurisprudence. Although the Court has often spoken in terms of neutrality toward religion,[4] it has never permitted the government to fund sectarian activities under the guise of neutrality. While the Court has long allowed religious institutions to participate in general government programs, it has always been on the condition that the benefits or services derived from such participation could not be used for religious purposes or to displace religious functions. *See Bradfield v. Roberts*, 175 U.S. 291, 297-98 (1899); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977); *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988). Thus, even when a general program is religiously neutral on its face, the Court has "always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion." *Kendrick*, 487 U.S. at 609.

The Court's college funding decisions present a case-in-point on the limits to the neutrality principle.[5] In all three cases, the Court allowed church-related colleges to participate in generally available public grant, loan and revenue bond programs for secular activities of the institutions. Based on the lack of evidence that any funds would be used for religious purposes, the Court held that the church-related colleges could

[4] *Abington School Dist. v. Schempp*, 374 U.S. 203, 222, 225 (1963) ("wholesome neutrality"); *Walz v. Tax Commission*, 397 U.S. 664, 668-669 (1970) ("benevolent neutrality"); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 745 (1976) ("scrupulous neutrality").

[5] *Roemer, supra*; *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton, supra.*

participate in those general funding programs.[6] At the same time, however, the Court stressed that government "funds [may] not be used to support specifically religious activity.'" *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 759 (1976).[7] Anticipating the broad neutrality argument made in this case, the *Roemer* Court explained that "a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to religious activity." *Id.* at 747. Under the Establishment Clause, government cannot "pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes aid available to secular and religious institutions alike." *Id.*

The neutrality principle, of course, is not limited to religion cases. It is an overarching principle that applies throughout the First Amendment. Indeed, some of the earliest cases that expressly applied the neutrality principle involved the intersection between religion and speech. *See Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951). Departures from the neutrality principle trigger strict scrutiny. In the religion context, however, the government's obligation to comply with the Establishment Clause is a compelling interest that satisfies the strict scrutiny standard. *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Invocation of the neutrality standard, therefore, begins the

[6] The Court emphasized in each case that the church-related colleges were nonsectarian in character and were prohibited under the respective statutes from using public funds for any religious purpose. *Roemer*, 426 U.S. at 740, 743; *Hunt*, 413 U.S. at 736-37; *Tilton*, 403 U.S. at 675.

[7] Accordingly, in *Tilton*, the Court struck down that provision of the Higher Education Facilities Act, 20 U.S.C. § 745 (b)(2), that placed only a twenty year cap on the ability of recipient institutions to use funded facilities for sectarian instruction and religious worship. *Tilton*, 403 U.S. at 683.

analysis; it does not end it. As Justice Harlan observed twenty-nine years ago, neutrality is "a coat of many colors" that on its own offers "no simple or clear measure" for achieving the goals promoted by the Establishment Clause. *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

Although those goals have been articulated in various ways, *see Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), this Court has not wavered from its view that the Establishment Clause was designed, at a minimum, to prevent the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970); *accord Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 381 (1985). As described below, numerous decisions of this Court hold that government funding of religious activities violates the Establishment Clause. Accordingly, even a facially neutral government program cannot be sustained if it violates, either singly or cumulatively, any of the other indicia of government support for religion that this Court has identified in its Establishment Clause cases.

The prohibitions on sponsorship, support, and involvement,[8] while in part designed to enhance the religious liberty goals of the Free Exercise Clause, also serve other ends: they guarantee religious equality among sects as well as

[8] *See Allegheny County v. ACLU*, 492 U.S. 573, 593-594 (1989) (the Establishment Clause prohibits "endorsement, favoritism, or promotion," of religion); *Ball*, 473 U.S. at 385 (the Establishment Clause "does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (the purpose of the Establishment Clause is "to prevent, as far as possible, the intrusion of either into the precincts of the other.").

between believers and nonbelievers; in addition, they protect the integrity of religion and civil institutions in ways that the Free Exercise Clause cannot. *See Ball*, 473 U.S. at 382; *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962). As such, the Establishment Clause does more than mimic the Free Exercise Clause. Leonard Levy, The Establishment Clause (1986) at ix. As Justice Blackmun observed recently, "it is not enough that the government restrain from compelling religious practices: It must not engage in them either. . . . The Establishment Clause protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community -- both essential for safeguarding religious liberty." *Lee v. Weisman*, 505 U.S. 577, 604, 606 (1992) (Blackmun, J., concurring).

The use of public funds to advance religious doctrines is irreconcilable with these core principles of the Establishment Clause. *Ball*, 473 U.S. at 385 ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."); *accord Kendrick*, 487 U.S. at 612. Indeed, this Court has long affirmed the funding limitations of the Establishment Clause, even in cases that otherwise upheld religious accommodations. *E.g.*, *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) ("Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person."). As Justice O'Connor stated in *Kendrick*, "*any* use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623 (O'Connor, J., concurring) (emphasis in original).

For fifty years, therefore, the Court has rejected the

simplistic notion that neutrality requires the government to treat religion and non-religion alike in all respects, especially when that principle would result in the state funding or sponsorship of religious instruction. Instead, the Court has recognized that neutrality "may not suffice by [itself] to achieve in all cases the purposes of the First Amendment." *Walz*, 397 U.S. at 695 (Harlan, J., concurring). This Court's traditional view of neutrality -- which allows many religious entities to participate in government programs upon the condition that secular benefits are not applied to religious purposes -- is entirely consistent with Establishment Clause goals. *See Rosenberger v. Rector & Visitors of University of Virginia*, 115 S. Ct. 2510, 2526 (1995) (O'Connor, J. concurring) ("the neutrality principle and the funding prohibition are . . . of equal historical and jurisprudential pedigree").[9] The Court should reaffirm that the "course of constitutional neutrality" cannot "be an absolute straight line; rigidity could well defeat the basic purpose of [the Religion Clauses], which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz*, 397 U.S. at 669.

B. The Court's Recent Establishment Clause Decisions do not Support an Expanded Notion of Neutrality.

The Court's more recent funding cases are consistent with this traditional view of neutrality. Contrary to petitioners'

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[9] "Our cases have permitted some government funding of secular functions performed by sectarian organizations. [Citing to *Kendrick*, 487 U.S. at 617; *Roemer*, 487 U.S. at 642; *Bradfield*, 175 U.S. at 299-300.] These decisions, however, provide no precedent for the use of public funds to finance religious activities." *Rosenberger*, 115 S. Ct. at 2525 (O'Connor, J., concurring).

claims, the Court has not deviated from the rule that the Establishment Clause prohibits the use of public funds to pay for religious activity, even when the funds are administered through neutral government programs. In *Bowen v. Kendrick*, the Court upheld the facial constitutionality of the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z *et seq.* (1988), as well as the general eligibility of religious organizations to receive funding for providing services under the Act. Significantly, however, the Court remanded the case to the district court to determine whether AFLA funds were going to pervasively sectarian organizations or were being used to promote religious activities of the recipient institutions. 487 U.S. at 621-22. While some of the justices were divided over the eligibility of certain institutions, the Court was unanimous in holding that public funds could not be "used to further religion," even when administered under a general benefit program. *Id.* at 624 (Kennedy, J., concurring). As the Chief Justice stated, "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religious affiliated institutions does not have the primary affect of advancing religion." *Id.* at 609.

Similarly, in *Zobrest*, the Court found no constitutional prohibition to using funds under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (1988), to pay for a sign language interpreter for a hearing impaired student attending a parochial school. 509 U.S. at 10. The Court reiterated that "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Id.* at 8. But, consistent with the rule in *Kendrick*, the Court also found no evidence that the interpreter

was involved in the instructional process or that the parochial school accrued any financial benefit from the presence of the interpreter. *Id.* at 10-12 (distinguishing the earlier aid cases of *Meek* and *Ball* which involved "direct grants of government aid [which] relieved sectarian schools of costs they otherwise would have borne"). Evidence that public monies would be used to further the religious program of the host parochial school would have required a different resolution of the case, notwithstanding the neutral character and general availability of IDEA funds.[10]

Finally, the decision in *Rosenberger*, while factually distinguishable from the above funding cases, is also consistent with the Court's long-standing position towards neutrality. There, the Court held that the Establishment Clause did not bar a student religious newspaper from receiving a share of student fees under a university program designed to enhance student free speech.[11] Yet, while affirming the importance of neutrality

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[10] In fact, the regulations implementing IDEA, like numerous other federal statutes and regulations, prohibit religious affiliates from using federal funds for any religious purpose, including religious worship, instruction, or proselytization. 34 C.F.R. § 76.532(a) (1994). *See also* the Hill-Burton Act, 42 U.S.C. § 291 *et seq*. (1988); the American Schools and Hospitals Abroad Program, 22 U.S.C. § 2174 (1988); the Emergency Shelter Grants Program, 42 U.S.C. §§ 11371-11378 (1988 and Supp. 1994); and the Child Care and Development Block Grant of 1990, 42 U.S.C. § 9858 (Supp. 1992).

[11] *Rosenberger* is distinguishable from the educational funding decisions in that it involved the equivalent of a public square that provided a largely unregulated platform for various forms of student expression. As such, it is more similar to the holdings in *Capitol Square Review and Advisory Board v. Pinette*, 510 U.S. 1307 (1995); *Lambs Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Education v. Mergens*, 496 U.S. 226 (1990); and *Widmar*, *supra*. *See* Kathleen M. Sullivan, "Parades, Public Squares and Voucher Payments: Problems of Government Neutrality," 28 Conn. L. Rev. 243-260 (1996).

in resolving the case, the Court also acknowledged the limitations of that principle. 115 S. Ct. at 2523 (noting the constitutional problems that would be presented in "a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity").[12] Citing to those earlier decisions involving general government programs such as *Kendrick* and *Roemer*, the Court acknowledged the "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Id.* As Justice O'Connor reiterated, *Rosenberger* does not "trumpet[] the supremacy of the neutrality principle nor signal[] the demise of the funding prohibition in Establishment Clause jurisprudence." *Id.* at 2528 (O'Connor, J., concurring).

Accordingly, in its post-*Aguilar* decisions, the Court has reaffirmed the crucial role of the "no-religious funding" principle in Establishment Clause jurisprudence. While affirming that notions of neutrality permit religiously affiliated institutions to participate in general government programs and apply those benefits toward secular ends, the Court has continued to prohibit the extension of such aid where it has the effect of subsidizing a religious function or brings about "the direct and substantial advancement of religious activity." *Zobrest*, 509 U.S. at 10-12.

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[12] "Evenhandedness is therefore a prerequisite to further inquiry into the constitutionality of a doubtful law, but evenhandedness goes no further. It does not guarantee success under Establishment Clause scrutiny." *Id.* at 2541 (Souter, J., dissenting).

III. The Principles Enunciated in *Lemon v. Kurtzman* Remain Central to Establishment Clause Adjudication.

A. There is no Reason for this Court to Reconsider the *Lemon v. Kurtzman* Standard.

The Agostini petitioners and several supporting *amici* criticize the test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and urge this Court to repudiate it in whole or in part. This attack on *Lemon*, however, is largely a diversionary tactic. The *Lemon* test is merely a distillation of Establishment Clause principles articulated over time in the Court's decisions. It has never represented more than a set of broad guidelines for determining Establishment Clause controversies. As the Court has recognized, these guidelines serve as "helpful signposts" in each particular case, *Hunt*, 413 U.S. at 741; they do not represent a "single constitutional caliper" for decision making. *Tilton*, 403 U.S. at 677. Indeed, the Court has declared its "unwillingness to be confined to any single test or criterion in this sensitive area," *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). Its decisions over the past dozen years reflect this nuanced approach. *See Kiryas Joel, supra* (preferential treatment; unlawful delegation of authority); *Lee*, *supra* (coercion); *Allegheny County v. ACLU*, 492 U.S. 573 (1989) (endorsement); *Marsh v. Chambers*, 463 U.S. 783 (1983) (historic).

Lower courts, as well, have recognized that the principles of the Establishment Clause are more important than any particular formulation and have not restricted their analysis to the *Lemon* factors. *See e.g. Ingebretsen v. Jackson Public Schools*, 88 F.3d 274 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 388 (1996); *ACLU v. Black Horse Pike Regional Bd. of Educ.*,

84 F.3d 1471 (3d Cir. 1996); *Harris v. Joint Sch. Dist.*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 115 S. Ct. 2604 (1995); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir.), *cert. denied*, 113 S. Ct. 2950 (1993); *Adler v. Duval County Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994); *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993). As a result, claims of confusion among lower courts are overstated. Conversely, many recent applications of the *Lemon* test have resulted in holdings that even petitioners and their *amici* would not consider to be hostile to religion. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Kendrick*, *supra*. Apparently, the complaint here is not so much with the application of *Lemon* itself but with the outcome of particular cases with which petitioners and their *amici* disagree. This does not represent a sensible rationale for reversing an analytical standard that has been an important part of Establishment Clause jurisprudence for thirty years. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("any departure from the doctrine of *stare decisis* demands special justification").

B. The Lemon Principles Remain Vital and Important to Establishment Clause Adjudication.

Although less frequently invoked in recent years, the *Lemon* test still represents this Court's best articulation of the principles and goals underlying the Establishment Clause.[13] In

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[13] In recent years, the Court has refined the *Lemon* test to emphasize an "endorsement or disapproval" inquiry first proposed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. at 687-694. Under this reformulation, the critical inquiry is whether the government's action has either the actual purpose or effect of endorsing or disapproving of religion. *Allegheny*, 492 U.S. at 592-594; *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987).

order to guard against prohibited government "sponsorship, financial support, and active involvement . . . in religious activity," the Court fashioned a test based on the "cumulative criteria" of its earlier decisions. *Walz*, 397 U.S. at 688; *Lemon*, 403 U.S. at 612. These "numerous precedents" have become firmly rooted'" in the Court's jurisprudence and their basic principles have guided Establishment Clause adjudication for over thirty years. *Wolman*, 433 U.S. at 236 (quoting *Committee for Public Education v. Nyquist*, 413 U.S. 756, 761 (1973)).[14]

The requirement that government policies and legislation be based on legitimate secular rationales does not impose an undue burden on legislators but instead rests on the premise that laws should be based on secular policy considerations, and that matters of religion are outside the cognizance of civil authorities. *See McGowan v. Maryland*, 366 U.S. 420, 449-51 (1961). As Justice O'Connor stated in *Wallace v. Jaffree*: "[i]t is not a trivial matter . . . to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws." 472 U.S. 38, 75 (1985) (O'Connor, J., concurring); *accord Edwards v. Aguillard*, 482 U.S. 578, 587 (1987). This requirement, in fact, finds its basis in some of the nation's earliest church-state decisions where courts first identified the necessity of secularly based legislation in a religiously heterogenous democracy. *See Thomasson v. State*, 15 Ind. 449, 454 (1860); *McGatrick v. Wason*, 4 Ohio St.

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[14] *See Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (A law is constitutionally invalid if its "purpose or effect . . . is to impede the observance of one or all religions or is to discriminate invidiously between religions . . .."); *Abington School Dist.*, 374 U.S. at 222 ("The test may be stated as follows: what are the purpose and the primary effect of the enactment?"). *See also* Daniel O. Conkle, "Lemon Lives," 43 Case W. Res. L. Rev. 865, 869 (1993) (the *Lemon* test "clearly recognizes that Establishment Clause analysis is a matter of degree").

566, 571-72 (1855).

The notion that the primary effect of a law should not advance or inhibit religion also has its roots deep in our jurisprudence. *See Everson*, 330 U.S. at 8-16 (tracing the historic influences behind the Establishment Clause); *Zorach*, 343 U.S. at 315. This prohibition is based on at least two premises. First, government advancement of religion is inherently a coercive and divisive process, either through the enforced financial support of religion or through the placement of government power and prestige behind particular articles of faith. *Everson, supra*; *Lynch*, 465 U.S. at 688, 692 (O'Connor, J., concurring). Second, the ban on advancing or inhibiting religion recognizes that "a union of government and religion tends to destroy government and degrade religion" and causes people to lose "their respect for any religion that . . . relie[s] upon the support of government to spread its faith." *Engel*, 370 U.S. at 431. As such, government may impermissibly advance religion by involving itself too closely in religious activities or functions, thereby threatening the integrity of both institutions and leading to perceptions of favoritism of particular sects.

Without the protection of these interests, and those promoted by nonentanglement, *see* pp. 20-23, *infra*, the Establishment Clause would revert to little more than a rule prohibiting the formal structures of an established church. Such a cramped view of the Establishment Clause is irreconcilable with our history and this Court's decisions, and ignores the "myriad, subtle ways in which Establishment Clause values can be eroded" and religion advanced by the government. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

C. Entanglement is a Necessary Component of Establishment Clause Jurisprudence.

The ban on excessive government entanglements with religion has a pedigree that is much older and broader than the religious funding cases of the 1970s. Even before the drafting of the First Amendment, James Madison warned that excessive government involvement in religious matters would "destroy that moderation and harmony" between the civil and the sacred that was necessary for the success of the new democracy. The tenuous harmony of that era, Madison explained, was due to "the forbearance of our laws to intermeddle with Religion . . .." Memorial and Remonstrance ¶ 11 (reprinted in Appendix to *Everson*, 330 U.S. at 69). Judicial concerns over government intrusion into religious affairs and the corresponding threats to religious autonomy such entanglements produce go back at least as far as the Court's 1872 decision in *Watson v. Jones*, 80 U.S. 666, 677 (1872), where the Court held that judges were neither authorized nor competent to decide internal issues of church governance. Since that time, the Court has frequently decried the "hazards" that accompany excessive government involvement in or oversight of religious matters. *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969); *accord Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) (remarking on the "substantial danger that the State will become entangled in essentially religious controversies").

The importance of avoiding government entanglements in religious affairs has been noted in other contexts and relationships, including areas of tax policy, labor relations, and antidiscrimination laws. *Walz*, 397 U.S. at 674-75; *Hernandez v. United States*, 490 U.S. 680, 693-93 (1989); *Jimmy Swaggart Ministries v. Equalization Board of Cal.*, 493 U.S. 378, 393-96

(1990); *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987). For example, in *Hernandez*, the Court concluded that a uniform rule governing charitable deductions had less potential for entangling the IRS in religious matters than one that permitted inquiry into whether the contribution served a religious benefit as opposed to a secular one. 483 U.S. at 694 (noting that the petitioner's proposal would lead to "'pervasive monitoring' for 'the subtle or overt presence of religious matter,' [which] is a central danger against which we have held the Establishment Clause guards," quoting *Aguilar*, 473 U.S. at 413).

As such, the Court's application of the entanglement standard to public funding issues rests on a broad-based concern about avoiding government oversight of and involvement in inherently religious matters. "The objective [of the entanglement prohibition] is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Lemon*, 403 U.S. at 614. At the same time, the test avoids the potential danger that government intrusion into religious affairs will result in the unequal treatment of religious institutions, either through unfamiliarity with matters of faith or through incompetence or design. *Hernandez*, 490 U.S. at 694.

By definition, a funding program is "a relationship pregnant with involvement," and although the existence of oversight is not unique to programs with religious recipients, it is through such oversight that constitutional concerns arise. *Lemon*, 403 U.S. at 621.[15] Because the government "is

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[15] "Although the very fact of neutrality may limit the intensity of involvement, government participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning,

constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination," it may be required to engage in the very type of detailed and ongoing monitoring of program recipients that leads to excessive involvement in religious matters. *Levitt v. Committee for Public Education*, 413 U.S. 472, 480 (1973). Such surveillance or involvement is especially problematic with those religious institutions, such as parochial schools, where "religion is so pervasive that a substantial portion of [their] functions are subsumed in the[ir] religious mission[s] . . .." *Hunt*, 413 U.S. at 743; *accord Kendrick*, 487 U.S. at 610. Complaints about the effect of the entanglement prong minimize the constitutional concerns that inevitably accompany the funding of religious institutions.

Moreover, the test is one of "excessive" entanglement and, thus, is "inescapably one of degree." *Walz*, 397 U.S. at 674-75; *accord Roemer*, 426 U.S. at 766. It is therefore an overstatement to claim that the entanglement prong presents an inescapable "Catch-22" that needlessly excludes religious institutions from participating in important government programs. As this Court's decisions have shown, in some situations religious institutions may participate in government funded programs without undue risk of either advancement or excessive entanglement with religion. *See Kendrick*, 487 U.S. at 615-17; *Committee for Public Education v. Regan*, 444 U.S. 646, 660 (1980); *Roemer*, 426 U.S. at 766. In many other situations, adjustments can be made in the way programs operate to ensure that unnecessary entanglements are avoided. *Aguilar, supra.* Appropriately understood and applied, the entanglement prong operates for the benefit of both religion and

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may escalate to the point of inviting undue fragmentation." *Walz*, 397 U.S. at 695 (Harlan, J., concurring).

civil society, at times insisting on long-term goals in place of short-term gains. Its function is essential for Religion Clause jurisprudence, and it should be retained as an independent test.

III. The Court's Decision in *Aguilar v. Felton* was Based on Well-Founded Concerns of Excessive Entanglement with Religion.

This Court's decision in *Aguilar* reflects the important goals behind the entanglement prong. Like the programs struck down in *Lemon* and *Meek*, Title I utilizes teachers to perform instructional functions which are indistinguishable from many of the core educational functions performed by the parochial schools.[16] As Justice Brennan recognized, public employees teaching in religious environments may be subject to subtle or overt pressure to tailor the substance of their instruction to conform to the mission of the religious school. *Aguilar*, 473 U.S. at 409. At a minimum, they will seek to avoid perceived conflicts between their duties and the schools' doctrinal positions. However, public education officials "must be certain, given the [command of the] Religion Clauses, that [publicly] subsidized teachers do not inculcate religion." *Lemon*, 403 U.S. at 619. In order to be true to this command, intrusive and ongoing monitoring will be inevitable and unavoidable.

Petitioners do not deny the inevitability of monitoring. Instead, they claim that entanglement concerns do not arise when only public school teachers are being monitored. That

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[16] "The key role played by teachers in [a parochial] school system had been the predicate for our conclusions that government aid channeled through teachers creates an impermissible risk of excessive government entanglement in the affairs of the church-operated schools." *Catholic Bishop*, 440 U.S. at 501.

claim oversimplifies the integrated nature of the Title I services. Unlike the provision of health services, for example, remedial education is closely tied to the educational function of the parochial school, thereby necessitating greater contact and coordination with parochial school teachers and officials. It is entirely predictable that these contacts will increase when public school teachers and parochial school teachers work side-by-side in the same buildings.[17] Such contacts will inevitably lead to comparisons of course content which may involve issues of religious doctrine or administration. It is therefore naive to suggest that monitoring can be limited to the activities of the public employees and not involve religious matters. Government involvement in issues of religious significance, which now are avoided through the separate operations, will become more frequent through the enhanced day-to-day relationship, and will in turn invite greater opportunity for government judgments on matters of faith. *See Lemon*, 403 U.S. at 620. These are the very type of intrusive activities the no-entanglement requirement is designed to avoid.

Accordingly, the *Aguilar* Court correctly found that the avoidance of excessive entanglement required that Title I services occur off parochial school premises. That holding was a constitutionally reasonable one. In order to avoid *ab initio* those hazards that would accompany the detailed monitoring and close pedagogical and administrative contact necessitated by placing public teachers in sectarian schools, the Court reasonably found that application of Title I unconstitutional.

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[17] *See* Findings of Fact in *Helms v. Cody*, 856 F. Supp. 1102, 1116-18 (E.D. La. 1994), regarding the increased level of interaction and the blurring of roles between public and private school employees under state program that places public school teachers in parochial schools.

IV. The Risk of Entanglement is Not the Only Establishment Clause Flaw in the Title I Program.

Even assuming, *arguendo*, that the entanglement problems identified by Justice Brennan in 1985 could be resolved -- and no one suggests that there has been any fundamental change in the structure of Title I during the intervening years -- the fact remains that petitioners are seeking permission to spend millions of federal tax dollars to place public school teachers in parochial schools for instructional purposes on an ongoing basis. This Court has never sustained such a massive program of aid to education in the parochial schools, nor has this Court ever allowed public school teachers and parochial school teachers to work side-by-side in the joint enterprise of educating parochial school students. Contrary to petitioners' assertion, therefore, *Aguilar* is not an anomaly in this Court's Establishment Clause jurisprudence. Rather, it is petitioners who seek to undermine a shared understanding of the Establishment Clause that the Court has reaffirmed on numerous occasions over the past fifty years.[18]

Petitioners argue that Title I can no longer be viewed as a program of public support for parochial education after *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest*, 509 U.S. 1. Those cases, however, cannot support the weight that petitioners place on them. Both

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[18] It is not surprising that Justice Brennan's opinion in *Aguilar* focused on entanglement since New York City attempted to defend its program primarily by relying on the "system of monitoring" it had put into place. 473 U.S. at 409. The concluding paragraph of Justice Brennan's opinion, however, emphasizes that the on premises operation of Title I is constitutionally flawed both because of "excessive entanglement" and because of "the benefits" it advances to pervasively sectarian educational institutions. *Id.* at 414.

cases dealt with a singular application of a government program that did not result in the substantial funding of religious education. Accordingly, the financial benefit received by the sectarian schools in those cases could be described as an "attenuated" one. *Zobrest*, 509 U.S. at 8; *Witters*, 474 U.S. at 488. Here, by contrast, New York City is seeking to have its public schools teachers provide continuing instruction to approximately 22,000 students each year in the parochial schools. Considering both the massive expenditures and the instructional nature of the services under Title I, the benefit to parochial schools can hardly be characterized "attenuated." This distinction is consistent with *Zobrest* itself, where the Court carefully distinguished *Meek* on the ground that it involved "massive aid" for instruction in the parochial schools, 509 U.S. at 11.[19] By any reasonable measure, the Title I program is much closer to the massive aid program struck down in *Meek* than the "attenuated" aid upheld in *Zobrest* and *Witters*.

Amici acknowledge that the massive nature of an aid program, on its own, may not render that program infirm under the Court's jurisprudence. But when the size of a program is combined with other factors, such as the funding of educational functions and its operation inside parochial schools, the benefit to sectarian schools becomes undeniable.

Petitioners' emphasis on the fact that Title I funds are designed to "supplement, not supplant" parochial school programs also collapses under scrutiny. *See* 20 U.S.C. §6322(b)(1); 34 C.F.R. §200.23(a). Their theory seems to be that because Title I funds can only be used for "supplementary"

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[19] As this Court also recognized in *Zobrest*, teachers are different because their function goes to the very essence of the educational enterprise. 509 U.S. at 13.

services, albeit on parochial school campuses, they do not "relieve[] sectarian schools of costs they otherwise would have borne in educating their students." *Zobrest*, 509 U.S. at 12. Unfortunately for petitioners, the *Zobrest* Court places *Meek* on the prohibited side of that constitutional line. If remedial education was not regarded as a supplementary service in *Meek*, it is not a supplementary service under Title I either. *Accord Wolman*, 433 U.S. at 244 (contrasting diagnostic services from instructional services which are "closely associated with the educational mission of the non-public school").

Moreover, the statutory and regulatory language cited by petitioners is not nearly as clear as they suggest. A parochial school that provides remedial instruction for its underachieving students is still eligible for Title I funding so long as it does not reduce any money spent from its own budget, 20 U.S.C. §6322(b)(1), or the level of services it was previously providing, 34 C.F.R. §200.12(a). What the statute does not address and what the record does not reveal is whether the parochial schools would have felt obligated to increase their own spending for remedial education in the absence of Title I funding. If parochial schools would have increased their spending for remedial education but for Title I, the distinction between "supplemental" and "supplant" becomes largely illusory.

Finally, petitioners contend that Title I does not subsidize religious education because it is earmarked exclusively for secular instruction delivered exclusively by public school employees. Thus, petitioners assert, Title I is best understood as a child benefit program rather than as a program that impermissibly aids parochial schools. This Court has taken a more realistic approach, recognizing that at some point the infusion of money into a pervasively sectarian institution for

instructional purposes becomes so substantial that it violates the Establishment Clause even though it is earmarked for allegedly secular use. *Cf. Meek*, 421 U.S. at 265. *See also Ball*, 473 U.S. at 394 (expressing concern about public schools taking over "entire responsibility" for parochial school education); *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29, 42 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 941 (1974) (warning about "escalating" state aid which "bespeak(s) the invasion of secular authorities in to the affairs of organized religion").

These financial considerations are augmented in this case by the added concern that Title I creates an inescapable link between public school teachers and parochial school teachers who are both engaged in teaching reading and math to the same students in the same buildings. *See Lemon*, 403 U.S. at 612. From the perspective of an impressionable elementary school student, the reasonable assumption is that the public school teacher and the parochial school teacher are participating in a joint enterprise. And, because the parochial school setting is a pervasively sectarian one, *e.g. Meek*, 421 U.S. at 366, it is unlikely that many young students will appreciate that the boundaries of the Title I program do not include sectarian instruction. It is far more likely that a young student will see all the teachers as indistinguishable and all teachers, therefore, as supporting the obvious religious mission of the parochial school.

This Court's concerns over joint enterprises between religious and civil entities are long-standing. Three decades before *Aguilar*, the Court drew a clear distinction between a "release time" program that permitted students to leave public school early for religious instruction at another site, and a program that permitted religious instructors to conduct religious classes in the public schools. Although both programs were

voluntary, the former was upheld, *Zorach*, 343 U.S. at 315, and the latter struck down, *McCollum v. Board of Education*, 333 U.S. 203 (1948). The distinction, Justice Frankfurter explained, flows from constitutional imperative "to abstain from fusing functions of Government and of religious sects . . . ." *Id.* at 227; *cf. Larkin v. Grandel's Den, Inc.*, 459 U.S. 116 (1982). As this Court reaffirmed in *Ball*, when impressionable schoolchildren are involved, government should the take all steps to avoid the "graphic symbol of concert or union or dependency." *Ball*, 473 U.S. at 391, (quoting *Zorach*, 343 U.S. at 312).

More recently, this Court has made the same point using the language of endorsement. For example, in *Allegheny County*, 492 U.S. at 600, the Court struck down the display of a creche in the main lobby of the county courthouse in part because the "display of the creche in this particular physical setting" conveyed the impression that its religious message was linked to the symbols of government that surrounded it. *Cf. Capitol Square Review and Advisory Board v. Pinette*, 510 U.S. 1307 (1995). This case presents the reverse situation. Petitioners would like to portray the Title I program as an enclave of secular instruction unrelated to everything and everyone around it. In the real world, however, that is not the way it is likely to be perceived by a young schoolchild.

Accordingly, there are sound Establishment Clause reasons for prohibiting public employees from teaching in the parochial schools under any circumstances. Nor was *Aguilar* the first case to recognize the propriety of that bright line. The line this Court identified in *Aguilar* is thus constitutionally supportable on several levels. That line should be respected and reaffirmed.

CONCLUSION

Based on the aforementioned reasons, *amici* urge this Court to affirm the decisions below.

Respectfully submitted,

Steven R. Shapiro
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Steven K. Green*
Julie A. Segal
Americans United for
Separation of
Church and State
1816 Jefferson Place, N.W.
Washington, DC 20036
(202) 466-3234

Arthur N. Eisenberg
New York Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 382-0557

* Counsel of Record

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